

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 63544-1-I
)	
Respondent,)	
)	
v.)	
)	
EDGAR DARIO AMAYA ROCHEZ,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 19, 2010
)	

Ellington, J. — Edgar Amaya Rochez appeals his conviction for burglary in the first degree, arguing that prosecutorial misconduct and juror misconduct deprived him of a fair trial. Because Amaya Rochez fails to demonstrate any reversible error, we affirm.

BACKGROUND

Paula Smith met Amaya Rochez in the summer of 2005 and they soon began dating. Sometime after their romantic relationship began, Amaya Rochez moved into Smith's apartment. Smith gave birth to the couple's daughter in April 2008. According to Smith, by the summer of 2008, their relationship had become "an off-and-on thing,"¹ Amaya Rochez did not have a key to her apartment, and he stayed the night at her

¹ Report of Proceedings (RP) (Mar. 24, 2009) at 62.

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apartment only when she invited him or allowed him to visit their daughter.

In the early morning hours of August 26, 2008, Smith's friend Shaun Hurd was at Smith's apartment visiting Smith and her baby. Around 2:00 a.m., they heard knocking at the door. When Smith heard Amaya Rochez, she told Hurd, "Don't open the door. He can go to his cousin's house."² Eventually, Amaya Rochez kicked the door down and grabbed Hurd and hit him in the face. Smith ran out of the apartment and called police. Amaya Rochez left before the police arrived.

The State charged Amaya Rochez with burglary in the first degree. At trial, Amaya Rochez testified that he was living with Smith and their daughter in August 2008 at Smith's apartment and that he was working as a janitor on the night shift in Bellevue in order to contribute to the household expenses. He claimed that he left his workplace shortly after 1:00 a.m. on August 26 and went to the apartment, where he expected Smith to be waiting up for him. Amaya Rochez testified that when Smith did not answer the door and he heard a male voice from inside the apartment, he thought his family was in trouble, so he kicked down the door and rushed into the apartment where Hurd hit him in the left side of the head. In an effort to defend himself and his family, Amaya Rochez hit Hurd, grabbed him, and wrestled with him. Amaya Rochez testified that he was confused and upset when Smith yelled that Hurd was her friend, so he walked out and went to his cousin's apartment in the next apartment complex.

On cross-examination, the prosecutor asked Amaya Rochez whether it was true that he was living with his cousin in August 2008 and "weren't staying with Ms. Smith on a regular basis."³ Amaya Rochez testified that he was living with Smith until August

² Id. at 67.

³ RP (Mar. 25, 2009) at 51.

and only spent two nights at his cousin's apartment after the incident with Hurd. When the prosecutor asked whether Amaya Rochez had spoken with Smith on the telephone since August 26, he denied it and claimed that he talked to his cousin. Later, after a recess during which the State indicated an intention to produce jail telephone records to the contrary, Amaya Rochez admitted that he had had telephone conversations with Smith.

In closing argument, the prosecutor reviewed the testimony of Smith and Hurd and argued that they were credible witnesses. He continued:

I am just going to conclude by talking just briefly about Mr. Amaya Rochez and his testimony on the stand. He has testified in a way that when you evaluate him according to those credibility standards, I have already looked back to the jury instructions that shows that he does have a bias and he has everything to gain by telling a story that is not true. . . .

. . . And the State has to prove to you beyond a reasonable doubt that the evidence you have heard from the two eyewitnesses in court is correct and that you should convict.

When you analyze the defendant's testimony, and I can't—I just do not have time to submit every single part of that testimony that was unreasonable; that you didn't call 911, we haven[t] heard from his cousin who he said he didn't live with, but who he wouldn't talk about. When he told a falsehood, apparently, to the court, or to the jury when he said, "No, I haven't talked to her at all." And then he had to come back and say yeah, I talked to her a week later. I had actually talked to her several times. I talked to her as late as March.

When you look at all those things together[,] the reality is that that's unreasonable and that is not a job for which there is a reason. And the law does not say that you must acquit, because the defendant could come on the stand and say, "it was self defense." That could happen in any case any time because the defendant has a right not to testify, but also has the right to testify. It doesn't mean that it's true. I am asking you to evaluate the credibility by the standards that are given [in] the jury instructions and when you assess that credibility to find the defendant guilty of burglary in the first degree.^[4]

During a recess immediately thereafter, out of the presence of the jury, defense counsel moved for dismissal or a mistrial, arguing that the prosecutor's suggestion that Amaya Rochez could have called his cousin as a witness impermissibly shifted the burden of proof and was prosecutorial misconduct. In the alternative, defense counsel requested a curative instruction. The trial court agreed to give a curative instruction and then stated on the record to the jury before the defense closing argument, "[T]he State does have the burden of proof in this matter and . . . the defendant does not have any obligation to bring witnesses to court."⁵

The jury found Amaya Rochez guilty as charged. The trial court polled the jury and each juror acknowledged on the record that the verdict was unanimous and was his or her verdict individually.

Within two weeks of the verdict, Amaya Rochez's trial counsel filed a motion for a new trial. She argued that the prosecutor committed misconduct when he suggested that Amaya Rochez should have called his cousin as a witness. She also requested an opportunity to interview the jurors based on statements certain jurors made to her following trial. In particular, defense counsel stated that (1) two jurors said they "believed" Amaya Rochez and regretted their verdict; (2) one of them stated that her decision would "haunt" her; (3) "several" jurors asked why the defense had not called Amaya Rochez's cousin to testify; and (4) "some" jurors asked why the defense did not produce Amaya Rochez's cell phone records.⁶ At the hearing on the motion for a new

⁴ Id. at 119–21.

⁵ Id. at 123.

⁶ Clerk's Papers at 74.

trial, the defense also argued that the State failed to produce exculpatory evidence consisting of various bills and documents listing Smith's apartment as Amaya Rochez's address, which Amaya Rochez received at the jail after the verdict and were apparently sent to him by Smith.

After noting that a prosecutor who remarks on the absence of witnesses enters "a somewhat dangerous area,"⁷ the trial court determined that the prosecutor's reference to Amaya Rochez's cousin was not prejudicial misconduct in the context of the trial, particularly in view of the curative instruction given immediately following the challenged argument.

The trial court also denied the defense request to interview the jurors, stating that, in light of the instructions to the jury and the results of the jury poll, the "expressions of regret by jurors in this case are not sufficient to suggest to the court that further inquiry would reveal that anybody was improperly coerced, or there was any kind of misconduct by the jury."⁸

Finally, regarding the documents indicating Amaya Rochez's address, the trial court stated, "Overall, there has been no showing that this is something that the defense on due diligence could not have discovered during trial to the extent that it might have provided some evidence of the residence of Mr. Amaya Rochez."⁹

The trial court denied the defense motions and imposed a standard range

⁷ RP (May 15, 2009) at 26.

⁸ Id.

⁹ Id. at 28.

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sentence. Amaya Rochez appeals.

DISCUSSION

Prosecutorial Misconduct

Amaya Rochez contends that the prosecutor committed misconduct during closing argument by suggesting the defense had a burden to present evidence, specifically the testimony of Amaya Rochez's cousin. To justify reversal based on a claim of prosecutorial misconduct, Amaya Rochez must show that the prosecutor's conduct was both improper and prejudicial.¹⁰ Prejudice arises only if there is a substantial likelihood the misconduct affected the verdict.¹¹ Our review of misconduct claims involves consideration of the context of the total argument, the issues in the case, the evidence, and the jury instructions.¹² Where a claim of prosecutorial misconduct is raised in a motion for a new trial below, we review the ruling for abuse of discretion.¹³

Although a prosecutor generally may not comment on the lack of defense evidence, the prosecutor may under proper circumstances refer to a defense failure to call a witness under the missing witness doctrine.¹⁴ This doctrine allows an unfavorable inference to be drawn when a party fails to call a witness who is within that party's control to provide testimony that would properly be part of the case and in the

¹⁰ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

¹¹ Id.

¹² State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting Brown, 132 Wn.2d at 561).

¹³ Id. at 51.

¹⁴ State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

interest of that party.¹⁵ In criminal prosecutions, the doctrine applies only if (1) the potential testimony is material and not cumulative; (2) the missing witness is particularly under the control of the defendant; (3) the witness's absence is not satisfactorily explained; (4) the State's argument does not shift the burden of proof or otherwise infringe a defendant's constitutional rights.¹⁶

The State fails to argue or demonstrate that the missing witness doctrine was properly applied here. No evidence in the record provided a foundation for the prosecutor's suggestion during cross-examination that Amaya Rochez was actually living with his cousin in the summer of 2008 prior to August 26 or to justify the suggestion in closing argument that Amaya Rochez should have called his cousin to rebut such a possibility. There was also no showing that the cousin was particularly under Amaya Rochez's control because it appears from the record that Smith also knew the cousin. The State also fails to satisfactorily explain how the argument was not an attempt to shift the burden of proof to Amaya Rochez.¹⁷ Under these circumstances, the prosecutor's remark was improper.

However, Amaya Rochez fails to demonstrate that he suffered prejudice. Where, as here, the defendant moves for mistrial based on prosecutorial misconduct, we will give deference to the trial court's ruling on the question of prejudice.¹⁸ "The trial

¹⁵ Id. at 652–53.

¹⁶ State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008).

¹⁷ The State admits that the remark suggested that the jury should draw a negative inference that "the defendant had something to hide" from the combination of Amaya Rochez's somewhat vague references to his cousin and the fact that the cousin did not testify. Respondent's Br. at 17.

court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial."¹⁹

As the trial court noted, the jury was specifically reminded that the State had the burden of proof and that Amaya Rochez did not have "any obligation to bring witnesses to Court."²⁰ The trial court also instructed the jury to decide the case based on the evidence presented at trial and that the statements and arguments of the attorneys are not evidence. We presume that jurors follow the trial court's instructions.²¹

Without acknowledging the trial court's curative instruction to the jury, or any other instruction, Amaya Rochez argues that the question posed by "several jurors" to defense counsel after the verdict as to why the defense did not call Amaya Rochez's cousin demonstrates that there is a substantial likelihood that the prosecutor's remark affected the verdict. But jurors' post-verdict statements regarding individual or collective thought processes leading to a verdict "'inhere in the verdict' and cannot be used to impeach a jury verdict."²² Under these circumstances, Amaya Rochez makes no showing that the trial court abused its discretion in its determination that the remark did not affect the verdict.

Juror Misconduct

Amaya Rochez next contends that because defense counsel's affidavit

¹⁸ State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

¹⁹ State v. Lord, 117 Wn.2d 829, 877, 822 P.2d 177 (1991).

²⁰ RP (Mar. 25, 2009) at 123.

²¹ Stenson, 132 Wn.2d at 730.

²² State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (quoting State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979)).

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regarding post-verdict comments and questions by jurors constituted a prima facie showing of

juror misconduct, the trial court should have conducted an evidentiary hearing to determine whether juror misconduct violated his right to a fair trial. A trial court's decision on a motion for new trial based on juror misconduct will not be disturbed on appeal unless the ruling is based on an erroneous interpretation of the law or constitutes an abuse of discretion.²³ In evaluating a claim of juror misconduct, the trial court may not consider matters which inhere in the verdict, including the effect of or weight accorded to the evidence by individual jurors or the jurors' intentions and beliefs.²⁴

Here, Amaya Rochez provided nothing more than defense counsel's hearsay statement regarding matters which inhere in the verdict. He did not submit any evidence of coercion or provide anything other than speculation to suggest that any juror failed to abide by his or her honest opinions or beliefs or otherwise violated the instructions.²⁵ Because Amaya Rochez did not make a prima facie showing of misconduct, it was not error for the trial court to deny his motion for a new trial without holding an evidentiary hearing.

Brady Material

Next, Amaya Rochez claims that the State violated the requirements of Brady v.

²³ State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

²⁴ Id. at 777–78 (quoting Cox. v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179–80, 422 P.2d 515 (1967)).

²⁵ Cf. State v. Cummings, 31 Wn. App. 427, 432, 642 P.2d 415 (1982) (evidentiary hearing appropriate where affidavits raised question of fact about juror deliberations not inhering in the verdict, specifically, spectator's comments to juror and that juror's comments to other jurors about defendant's criminal history when that history was not admitted in evidence).

Maryland,²⁶ by failing to disclose evidence in Smith's possession, specifically, bills for cell phone and cable service sent to Amaya Rochez at Smith's address during August 2008. Under Brady, the State has a constitutional obligation to disclose material exculpatory evidence in its possession.²⁷ Evidence is material if there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed.²⁸ There is no Brady violation if the defendant could have obtained the evidence himself using reasonable diligence.²⁹

Amaya Rochez has not established that the State had knowledge, possession or control of the documents in question. Amaya Rochez also fails to demonstrate any error in the trial court's determination that the defense could have obtained the evidence using reasonable diligence because Amaya Rochez would have known that the bills existed as they were his accounts and he had lived at Smith's apartment at some point. And the record demonstrates that Amaya Rochez and Smith spoke on the telephone on several occasions prior to trial and that they both intended to maintain their romantic relationship. Under these circumstances, Amaya Rochez fails to establish a Brady violation.

²⁶ 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

²⁷ Id. at 87.

²⁸ In re Pers. Restraint of Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993).

²⁹ State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004).

Finally, Amaya Rochez claims that cumulative error denied him a fair trial. The cumulative error doctrine applies if there are “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.”³⁰ Because Amaya Rochez has not established any prejudicial error, the cumulative error doctrine does not apply.

Affirmed.

Edington, J

WE CONCUR:

Schiveller, J

Grosse, J

³⁰ State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).